

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

VERIZON WIRELESS, INC¹

Employer

and

Case 24-UC-221

HERMANDAD INDEPENDIENTE DE
EMPLEADOS TELEFONICOS²

Petitioner

**DECISION, ORDER CLARIFYING UNIT AND ORDER
PARTIALLY DISMISSING PETITION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned makes the following findings and conclusions:³

¹The Employer's name appears as amended at the hearing.

²Petitioner's name appears as amended at the hearing.

³Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. During the past calendar year, the Employer, a wireless communication provider in Puerto Rico, derived gross earnings in excess of \$100,000. Accordingly, I find that it is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the employer.

No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(c)(6) and (7) of the Act.

I. ISSUES

The Petitioner, contrary to the Employer, seeks to clarify an existing unit of office, professional and technical employees by including the classifications of Fraud Analyst and Program Distribution Official. The Employer requests the dismissal of the petition on the following grounds: (1) this petition is identical to one previously filed and dismissed by the Board (24-UC-190) for lack of interest;⁴ (2) the classifications have been historically excluded from the unit as evidenced by two prior collective bargaining agreements; (3) the Fraud Analyst position, identical to the one petitioned here, has existed at Puerto Rico Telephone Company (“PRT”) since 1998, therefore it is not a newly created position nor one that has undergone substantial change since its creation;⁵ (4) the Union never requested the inclusion of these classifications in the bargaining unit since their creation; (5) the Fraud Analyst position is a managerial position and/or guard position that mandates its exclusion; (6) the Program Distribution Official is a managerial position; and that (7) the Program Distribution Official does not share sufficient terms and conditions of employment with other unit employees. The Union disputes the Employer’s assertions arguing that the motion to dismiss should be denied.⁶

II. DECISION

For the reasons discussed below Employer’s Motion to Dismiss the petition is **granted** as to the Program Distribution Official as the record reflects that the Program Distribution Official has been historically excluded from the bargaining unit. However, the Employer’s motion is **denied** as to the Fraud Analyst position, as the record shows that this position has not been historically excluded from the unit nor is it a managerial or guard position. Rather, as more fully discussed below, the Fraud Analyst shares a sufficient community of interest with unit employees to warrant its inclusion in the unit. Therefore, the unit shall be clarified to include the Fraud Analyst.

III. STATEMENT OF FACTS

1. The Program Distribution Officials

The Employer,⁷ a wireless communication provider in Puerto Rico, employs approximately 400 office, professional, and technical employees that have been represented by

⁴The petition in 24-UC-190 is identical to the current case. The record showed that the petition in 24-UC-190 was dismissed because the petitioner did not show up at the hearing. However, since the order dismissing the case did not rule on the merits, nor dismiss the petition with prejudice, the Petitioner is not procedurally barred from refiling its petition.

⁵The Employer’s motion to dismiss is denied with regards to the argument that the Union never requested the inclusion in the bargaining unit of an identical Fraud Analyst position at Puerto Rico Telephone Company (“PRT”). PRT and the Employer are different employers under the Act. The Fraud Analyst position at PRT is not at issue herein.

⁶The Union filed an opposition entitled “Union’s Opposition to Motion to Dismiss Filed by the Employer Wireless and Memorandum of Law” and a brief both of which are rejected as untimely. Nevertheless, it is noted that the Union orally opposed the Employer’s Motion to Dismiss the petition at the hearing and submitted evidence at the hearing in support of its opposition which evidence is duly considered herein.

⁷In 1995, the Employer was part of the Puerto Rico Telephone Company (“PRT”) a Commonwealth-owned telecommunications company. The unit was originally certified by the Puerto Rico Labor Board in 1995. In 1996,

the Petitioner since 1995.⁸ The five Program Distribution Officials are currently employed in the “Indirect Sales” department, a division of the Employer’s regular Sales Department. This classification is responsible for managing the sales generated by independent salesmen contracted by the Employer to sell its line of products and services to consumers. The independent salesmen, most of whom operate as individuals or corporations, are authorized to sell the Employer’s telephones and wireless services at a pre-established price and compensation. The Program Distribution Official’s primary job functions include identifying prospective candidates as sales personnel, contracting and training independent sales personnel, levying sanctions for non-compliance and terminating contracts for non-performance.

The record reflects that this classification was created by the Employer in or about November 1999 and that the Petitioner became aware of its existence on June 24, 2000, when it received notification from the Employer. Between September 15, 1999 and October 18, 2000, the parties negotiated a collective bargaining agreement that was signed on October 25, 2000 and became effective during the period of October 23, 1999 to October 22, 2003. The record also reflects that the Petitioner never requested to include this classification in the bargaining unit despite having official notice of its creation before the 2000-2003 agreement was signed. Further, the record also reflects that the Petitioner did not seek to include this classification through bargaining until November 2003, after the collective bargaining agreement had expired.⁹

2. The Fraud Analyst Position

The Employer presently employs one Fraud Analyst that is responsible for monitoring computers that detect fraudulent use of the Employer’s products and services. The duties and responsibilities of this classification include contacting consumers to verify account information and answering consumer questions and complaints, providing orientation regarding fraudulent use, restricting consumer access to fraudulent accounts at the behest of management or clients, and conducting initial internal investigations. These duties and responsibilities are identical to those performed by Client Service Coordinators, a classification covered by the extant collective bargaining agreement. The employees in this classification work in the Systems and Anti-Fraud Unit of the Employer’s Client Service Department utilizing the same computer software that is based on consumer use patterns. The record also reflects that the Fraud Analyst works alongside the Client Service Coordinators in the Employer’s Anti-Fraud Unit in the Third Floor of the Employer’s facility and that they share common supervision. Additionally, these classifications have comparable and/or similar salaries and are at the same professional grade level. The Client

after the enactment by the U.S. Congress of the Federal Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et. seq.*, PRT separated its wireless division from the company and organized it as a separate corporation. In 1999 both wireless and line telecommunications companies were privatized by the Commonwealth of Puerto Rico and sold to GTE. In June 30, 2000, GTE acquired Bell Atlantic Corporation and consolidated its wireless operation into one wireless company known as Verizon, the Employer herein.

⁸The extant collective bargaining agreement covering the unit employees herein expires by its terms on December 31, 2008 and was negotiated during the period August 19, 2003 to March 30, 2004. Prior to the extant agreement and as noted herein, the previous agreement was signed on October 26, 2000 and covered the period of October 23, 1999 to October 22, 2003. The record also reflects that this earlier agreement was negotiated by the parties during September 19, 1999 and October 18, 2000.

⁹Although the Petitioner filed unit clarification petition 24-UC-190 on November 28, 2000, for the same classification, this petition was dismissed on October 23, 2003 because Petitioner failed to appear at the formal hearing. This petition was filed after the parties already had signed the 2000-2003 collective bargaining agreement.

Service Coordinators also maintain telephonic contact with consumers, answer questions, attend to complaints and provide consumer orientation and have authority to restrict access to clients' accounts when investigations detect fraud. In sum, the record showed that the Fraud Analyst perform the same functions as the Client Service Coordinators.

The only evidence presented by the Employer on the differences between the two classifications was that the Fraud Analyst's duties, contrary to the Client Service Coordinators,¹⁰ authorized investigations of employee misconduct. Client Service Coordinators on the other hand, are not authorized to investigate the Employer's employees, and whenever preliminary investigations detect employee negligence or malfeasance, the Client Service Coordinators are required to refer the case to the Employer's Security Department for further investigation.¹¹ However, this difference is not followed in practice, because the record reveals that even the Fraud Analyst is required to refer such cases to the Security Department for further investigation, in the same manner and for the same reasons as the Client Service Coordinators. Additionally, although the Employer suggested other dissimilarities in working conditions, the record does not reflect any other significant differences between the two classifications.

In this respect, the Employer introduced evidence indicating that towards March or April of 2004 (several months after the unit clarification petition was filed), it reassigned the Fraud Analyst to the Security Department, located in the Ninth Floor of the Employer's facility, thus purportedly physically separating the Fraud Analyst from the Client Service Coordinators. However, the evidence also revealed that this assignment was temporary, that the nature of the tasks assigned at that time was also temporary, and that the reason for the transfer was transitional. Thus, the record revealed that the Fraud Analyst was relocated in order to train her on the use of some new software being compared to the one currently in use. In all other respects, the tasks that the Fraud Analyst continued to perform at this temporary location were essentially the same as those performed while she worked in the Anti-Fraud Unit on the Third Floor. Moreover, the Fraud Analyst continued to be supervised by the Anti-Fraud Unit supervisors and reported to the same Anti-Fraud Unit. Accordingly, there was no significant or sufficient change in tasks to alter the overall nature of her work, while she worked temporarily at the Security Department in the Ninth Floor of said facility.

With regard to the timeliness of Petitioner's request to include the Fraud Analyst in the extant unit, the record reflects that although the Fraud Analyst's position was created on February 24, 2000, it was not posted for employee bidding until May 10, 2000 nor formally notified to Petitioner until December 4, 2000.¹² Thus, the record shows that there is no basis to conclude that the Union knew of the existence of the Fraud Analyst position by the time that the parties ended negotiations and signed an agreement on October 26, 2000. As noted, the earliest that knowledge of the position's existence could be imputed to the Petitioner is November 28,

¹⁰The Employer does not have written job descriptions for Client Service Coordinators working in the Anti-Fraud Unit. These comparisons are based on testimony presented at the hearing regarding the duties performed by Client Service Coordinators.

¹¹The record reflected that the Employer's internal security is delegated to PRT Security Department, located in the Ninth Floor of its facility, and that the employees who perform security related jobs are not employed by the Employer.

¹²I note, nevertheless, that Petitioner knew of the Fraud Analyst position's existence at least as early as November 28, 2000, the date that it filed case No. 24-UC-190.

2000, the date that it filed unit clarification petition 24-UC-190. Under either scenario, the Petitioner did not have an opportunity to bargain about this classification during the negotiations leading to the signing of this agreement (September 15, 1999 to October 18, 2000) nor at the time that it signed the aforementioned agreement.

In contrast, the Petitioner attempted to include the position in the unit shortly after it received notification without success¹³ and on August 8, 2003, prior to the contract's expiration, Petitioner notified the Employer that it intended to include the Fraud Analyst position in the bargaining unit. It did so by including this classification in the written proposal that it submitted to the Employer with its initial request to bargain a new agreement. The record also reveals that the Petitioner continued to press for its inclusion when on August 26, 2003 the Union again sent the Employer a bargaining proposal that included this classification. Finally, the record reflects that although the Petitioner agreed to a collective bargaining agreement on September 18, 2003 that did not include the Fraud Analyst position, it did so without waiving its right to represent this classification. Thus, before the signing of the collective bargaining agreement, the Petitioner notified the Employer in writing that it was reserving its right to claim its representation in the appropriate forum. The Petitioner confirmed its request in a November 14, 2003 letter requesting the Employer to add this classification to the extant bargaining unit. The record reflects that it was only after the Petitioner received no reply to its request that it filed the instant petition (December 5, 2003). As noted, supra, the parties signed their most recent collective bargaining agreement on April 15, 2004.

IV. DISCUSSION

A. **The Employer's Motion to Dismiss**

1. The Program Distribution Officials were Untimely Requested

The Board has held that classifications are "historically excluded" from a unit when they were created before the parties entered into a collective bargaining agreement and the union did not request their inclusion in the unit when the parties were negotiating that agreement. See SunarHauserman, 273 NLRB 1176, 1177 (1984). In this case, the parties agreed to a collective bargaining agreement on October 25, 2000 that contained a contractual unit that did not include the Program Distribution Officials. This agreement was negotiated between September 15, 1999 and October 18, 2000. The subject classification was created in or about November 1999 and the Petitioner first learned of the existence of this classification on or about June 24, 2000 when it was notified by the Employer. The facts in the record also reflect that while Petitioner had actual notice of the classification's creation during June, 2000, at least four months before the contract was executed on October 26, 2000, it made no effort to include the classification during this period nor reserve its right to request its inclusion in the unit prior to executing the aforementioned agreement. Finally, it was only after the agreement was signed that the

¹³On November 28, 2000, the Union filed an unfair labor practice charge in Case 24-CA-8804 alleging the Employer's failure to bargain over the creation of this classification and filed the prior unit clarification petition (24-UC-190) that, as noted supra, was dismissed on October 26, 2003 when the Petitioner failed to appear at the formal hearing on the matter. By that time, the parties were already engaged in negotiations for a successor agreement.

Petitioner sought to include the position with the filing of a unit clarification petition (24-UC-190) on November 28, 2000. Accordingly, I find that the Program Distribution Official classification was historically excluded and hereby grant the Employer's Motion to Dismiss the Petitioner's request to amend the unit by including the Program Distribution Official in the bargaining unit.

2. The Request to include the Fraud Analyst Position was timely

However, with regards to the Fraud Analyst classification, I find that it was not historically excluded as argued by the Employer. The Board has found a disputed classification not to be "historically excluded" when the disputed classification was: (1) created midway during the duration of a contract; (2) the union's first opportunity to include the classification was during the parties' subsequent contract negotiations; and (3) the union unsuccessfully attempted to include the classification into the unit during the negotiations, but reached impasse, and then informed the employer that it would pursue the disputed classifications by way of a unit clarification petition. In these cases, the Board has found that the union has not abandoned its proposal to include the position in the unit in exchange for a concession during bargaining. In these circumstances, the union does not acquiesce in the exclusion of the position from the unit. See, SunarHauserman, 273 NLRB at 1177; St. Francis Hospital, Inc., 282 NLRB 950, 951 (1987).

With regards to the Fraud Analyst classification, there was no such neglect or abandonment of the Petitioner's request for bargaining to include the Fraud Analyst position in the unit. First, the record is devoid of any evidence that the Union knew about this classification before the signing of the 2000-2003 collective bargaining agreement on October 26, 2000. For all practical effects, the position was created during the 2000-2003 contract at which time the Petitioner requested to include the subject classification in any successive agreement. Second, the Petitioner bargained about the inclusion of that position in the unit, and arriving at an impasse, it advised the Employer that while it was agreeing to a unit description that did not include that classification during the 2003 bargaining sessions, it was not waiving its right to pursue the matter in another forum. Petitioner subsequently filed the instant petition to clarify the unit by including the subject classification. Accordingly, as the Petitioner never waived nor abandoned its position to include this classification in the bargaining unit, the Employer's Motion to Dismiss the petition as to the Fraud Analyst position is denied.

B. The Fraud Analyst Position is Appropriately Included in the Unit

The Employer claims that the Fraud Analyst position is managerial, based on the alleged sensitive nature of the investigations performed by the Fraud Analyst. However, the Employer failed to establish a factual distinction between investigations carried out by the Client Service Coordinators working on the Anti-Fraud Unit who are unit employees herein and the Fraud Analyst. Furthermore, the record demonstrated that whenever a possibility of involvement in fraud or negligence by a Verizon employee arose, all investigations were referred for further processing to the Security Department. The evidence reflects that the Fraud Analyst neither retained the discretion on whether or not to refer a case to Security nor carried out independent investigations of employee misconduct. Thus, the Employer failed to establish that the Fraud

Analyst exercised sufficient discretion within, or even outside of established employer policy, to make it a managerial position. NLRB v. Yeshiva University, 444 U.S. 672, 682-83 (1980). Further, the record did not support a conclusion that the Fraud Analyst is so aligned with management that she represents management interests, taking or recommending discretionary actions that effectively control or implement employer policy. Id.

The Employer also claims that the Fraud Analyst is a guard position under Section 9(b)(3) of the Act, arguing that the Fraud Analyst is directly involved in investigating employee misconduct and enforcing the Company's rules against bargaining unit employees. The record shows otherwise. The primary job duty of the Fraud Analyst is to monitor general fraud investigations through computer software that triggers alarms based on consumer use patterns in the same manner as the Client Service Coordinators. From there, initial investigations are carried out and if the possibility of fraud arose, the cases are referred to the Security Department for further processing. These functions are similar to those performed by monitoring clerks in American District Telephone, 160 NLRB 1130, 1138 (1966), where the Board determined that the passive monitoring of signals of employer's customers is not a guard position. See also, Wells Fargo Alarm Services, 218 NLRB 68 (1975) enfd 533 F.2d 121, 124, (3rd Cir. 1976); Atlanta Hilton & Tower, 278 NLRB 474, 479-80 (1986).

Finally, it is determined that the Fraud Analyst shares a sufficient community of interest with unit employees to warrant the inclusion of this classification in the unit. The record indicated sufficient interaction by the Fraud Analyst with unit employees, common supervision, functional integration, similar skills and functions as other unit employees, daily contact with unit employees, similar salaries, general working conditions and work benefits. As this classification shares a sufficient community of interest with other unit employees, the unit is clarified to include the Fraud Analyst.

VI. ORDER

Based upon the above findings of fact and conclusions of law, IT IS HEREBY ORDERED that:

- a. The Employer's motion to dismiss the petition with respect to the Program Distribution Officials is granted and,
- b. The Employer's motion to dismiss the petition regarding the Fraud Analyst position is denied and the unit is hereby clarified to include the classification of Fraud Analyst.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570. This request must be received by the Board in Washington by December 17, 2004.

Dated at San Juan, Puerto Rico, this 3rd day of December 2004.

/s/

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